

[*Smith v. Tennessee Valley Authority*](#), 87-ERA-20 (ALJ Oct. 16, 1987)

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U.S. Department of Labor
Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669
804-722-0571

DATE: October 16, 1987
CASE NO. 87-ERA-20

IN THE MATTER OF

JERRY D. SMITH,
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,
RESPONDENT.

RECOMMENDED ORDER OF DISMISSAL AND
RECOMMENDATION THAT ALLEGATIONS OF IMPROPER PRESSURE ON
THE DEPARTMENT OF LABOR AND ITS STAFF BE INVESTIGATED

By letter of October 1, 1987, Complainant's counsel stated her client was withdrawing his complaint because he believes that improper pressure has been brought on the Department of Labor precluding an opportunity for a fair hearing. (Appendix A).

It is recommended that the Complaint be dismissed since Mr. Smith has moved to withdraw it. However, Mr. Smith and his counsel have made serious allegations charging that the integrity of the Department of Labor's proceedings have been compromised by improper pressure brought to bear on the Department and its staff. (Appendix B). Counsel for Respondent has replied to these allegations by letter of October 13, 1987. (Appendix C).

In view of the serious nature of the allegations the public interest requires an expeditious investigation of these charges. It is recommended that these allegations be referred to the appropriate agency for investigation.

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ORDER

IT IS ORDERED that the Complaint of Jerry Smith be dismissed on the basis of his motion to withdraw.

IT IS FURTHER ORDERED that the file herein is certified to the Secretary of Labor with the recommendation that the allegations of improper pressure on the U.S. Department of Labor in proceedings under the employee protection provisions of the Energy Reorganization Act be referred to the appropriate agency for investigation.

THEODOR P. VON BRAND
Administrative Law Judge

TPvB/jbm

LAW OFFICES
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1773 T STREET, N.W.
WASHINGTON, D.C. 20009

(202) 745-1942

LYNNE BERNABEI
DEBRA S. KATZ*

October 1, 1987

*ADMITTED IN N.Y. AND WIS. BAR ONLY

Judge Theodore VonBrand
U.S. Department of Labor
Office of Administrative Law Judges
55 West Queens Way, Suite 201
Hampton, Virginia 23669

RE: Smith v. Tennessee Valley Authority, 87-ERA-20

Dear Judge VonBrand:

My client Jerry D. Smith is withdrawing his complaint filed against the Tennessee Valley Authority.

Mr. Smith is withdrawing his complaint because he believes that improper pressure has been brought on the Department of Labor ("DOL") such that he cannot receive a fair hearing in the DOL administrative process.

Please inform me if I need to take more formal steps to dismiss Mr. Smith's complaint.

Thank you for your attention to this matter.

Sincerely,

Lynne Bernabei

cc: Brent Marquand, Esquire
/am

Appendix A

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LYNNE BERNABEI
DEBRA S. KATZ*

October 8, 1987

*ADMITTED IN N.Y. AND WIS. BAR ONLY

Judge Theodore Von Brand
United States Department of Labor
Office of Administrative Law Judges
55 West Queens Way, Suite 201
Hampton, Virginia 23669

RE: Smith v. Tennessee Valley Authority, 87-ERA-20

Dear Judge Von Brand:

Pursuant to your order of October 6, 1987, I am submitting the following information to document Mr. Smith's charges that he did not believe he could receive a fair hearing from the Department of Labor.

First, it appears from publicly-released memoranda that the U.S. Nuclear Regulatory Commission ("NRC") has attempted to interfere with Department of Labor ("DOL") investigations in the Spring of 1986, after DOL investigator Sandra Seeley corroborated TVA's management pattern of harassment against three TVA nuclear engineers, including Mr. Smith. In these memoranda, the NRC appears to recommend to DOL that Ms. Seeley be removed from investigations against TVA. The only basis of the NRC request is that TVA officials have told the NRC that TVA is unhappy with the investigator.

A short time later Ms. Seeley's superiors removed her from investigations of "whistleblower" complaints made against TVA. We also have reason to believe that Ms. Seeley received a performance rating that year below her usual and historic ratings.

Also in March, 1986, Ms. Seeley's lengthy report on the Mansour Guity harassment case was released publicly. The report was highly critical of top TVA management and found harassment widespread throughout the TVA nuclear program. After the local and national press widely reported on Ms. Seeley's report, DOL instituted new rules which prohibited reports on harassment cases from exceeding 10 pages, and prohibited investigators from including any conclusions in the reports.

Appendix B

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From the fall of 1986 through the early Spring of 1987, the Department of Labor removed from the Knoxville Office all investigative responsibilities for TVA nuclear whistleblower complaints, even though the office had developed an expertise and experience in investigating such complaints. As a consequence, inexperienced investigators, who sometimes lived in remote parts of the state, were assigned to these cases.

In a particularly large case involving 23 employees of the Quality Technology Company ("QTC"), the investigator assigned to the case took over four months to investigate the complaint. After the report was written, DOL attorneys in Washington, D.C., concluded that the Department had no jurisdiction over the complaint because QTC employees were not employees of TVA. This then became the investigative finding of the Department. This is the first time in anyone's knowledge that responsibility for the investigative finding was removed from the investigator who did the investigation and given to attorneys in Washington. Moreover, the Department's investigative finding rested on little if any legal authority. (The QTC employees have appealed that finding, and are awaiting a ruling from an Administrative Law Judge.)

Moreover, the Department of Labor investigator investigating Mr. Smith's complaint knew nothing about TVA or his prior complaints. He came out with an adverse finding prior to interviewing the major witnesses who could corroborate Mr. Smith's allegations and without obtaining a signed, corrected statement from Mr. Smith. Such shoddy investigative practices indicate that the investigator decided before the investigation that he would find against Mr. Smith.

I have attached to this letter a copy of my letter to Senator John Glenn, Chairman of the Senate Committee on Governmental Affairs, which is investigating the often improper and cozy relationship between the NRC and nuclear utilities such as TVA which it regulates. This letter documents some of the problems identified above.

Respectfully submitted,

Lynne Bernabei
Attorney for Jerry D. Smith

cc: Brent Marquand, Esquire
Jerry D. Smith
Sandra Seeley
/am

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LYNNE BERNABEI
DEBRA S. KATZ*

May 27, 1987

*ADMITTED IN N.Y. AND WIS. BAR ONLY

Senator John Glenn
Chairman
Senate Committee on Governmental Affairs
Dirksen Building 340
Washington, D.C. 20510

Dear Chairman Glenn:

The Senate Committee on Governmental Affairs, which you chair, is investigating the "cozy" relationship between the U.S. Nuclear Regulatory Commission ("NRC") and those nuclear utilities which it is charged with regulating. One of the NRC licensees on whom you have focused is the Tennessee Valley Authority ("TVA") whose operating reactors and plants under construction are currently shut down for safety and management problems.

I have recently received memoranda from the NRC which indicate that the NRC, on TVA's behalf, has interfered in the Department of Labor's investigations into harassment and intimidation at TVA's nuclear power plants. See Letter from G. Cunningham to J. Hyland (March 1985), and Memorandum from G. Cunningham to V. Stello (March 17, 1986), attached hereto. TVA's harassment and intimidation of workers in its nuclear program has historically been a serious problem at TVA; TVA management's proven retaliation has inhibited the identification of safety flaws in TVA's reactors in a timely manner. The NRC now acknowledges that "harassment and intimidation" is an issue which must be resolved prior to restart of any of TVA's plants.

Yet last March, after Department of Labor investigator Sandra Seeley corroborated TVA's harassment of three TVA nuclear engineers over a four year period, the NRC attempted to pressure the Department of Labor to remove the investigator. NRC Executive Legal Director Guy H. Cunningham, III, wrote to the Department of Labor's Inspector General, requesting that he investigate allegations that Ms. Seeley was biased against TVA. Mr. Cunningham based his request solely on representations made to him by TVA attorneys who at that time had vowed to fight the Department of Labor findings of discrimination in adversary proceedings.

In this context Mr. Cunningham's letter must be seen as an attempt to pressure the Department of Labor to remove the investigator who made findings of discrimination against TVA.

A short time later Ms. Seeley's superiors removed her from investigations of "whistleblower" complaints made against TVA.

In addition, in March, 1986, Ms. Seeley completed a lengthy report which supported her finding that TVA had discriminated against nuclear engineer Mansour Guity since 1982. The report was highly critical of top TVA management, and found harassment was widespread in the TVA nuclear program. After publication of the report, DOL instituted new rules which prohibited reports on harassment cases from exceeding 10 pages, and prohibited the investigators from including any conclusions in these reports.

Although the NRC attempted to pressure the Department of Labor to investigate Ms. Seeley, it has taken little action against TVA to stop TVA's harassment and discrimination of employees identifying safety problems.

In April, 1986, I represented four nuclear engineers who had filed complaints of discrimination alleging that top TVA managers had denied them promotions, removed their safety responsibilities and supervisory duties, and pressured them to change their safety findings. In three cases the Department of Labor found discrimination in the fourth case, TVA settled with the engineer prior to a finding, and admitted its managers had acted improperly.¹

In a meeting before the Commission on March 11, 1986, TVA General Counsel Herb Sanger, Jr., and TVA Manager of Nuclear Power Steven White told the Commission that they knew little about harassment at TVA's nuclear power plants because neither the engineers filing complaints of harassment nor the Department of Labor would release information to them. Knowing these statements to be false, I requested that the Commission investigate the statements of Messrs. Sanger and White.

¹ I now represent two of those engineers in new complaints of discrimination filed with the Department of Labor. I also represent 23 former employees of the Quality Technology Company ("QTC") who have filed a complaint charging that TVA's termination of QTC's contract and removal of its safety responsibilities was in retaliation for QTC's corroboration of safety problems in TVA's nuclear power program.

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Although the Commission has apparently completed its year-long investigation into these false statements, it has yet to be released to the public. Further, the Commission has not indicated whether it will take any enforcement action against TVA for material false statements which these TVA officials made to Commission members during a Commission meeting.

Even more striking, however, is that TVA continues unimpeded, its harassment of TVA workers, managers, and contractors. An increasing number of employees have filed complaints with the Department of Labor within the last few months. The NRC has refused to take any enforcement action against TVA other than a fine levied against the nuclear utility for the DeFord incident which took place five years ago.

Steve Richardson, Deputy Director of the Office of Special Projects, Division of TVA Projects, told me that the NRC is relying on investigations of harassment and intimidation conducted by TVA's Office of Inspector General. The NRC is then merely reviewing the investigative reports of the TVA IG's Office. Mr. Richardson indicated further that TVA's IG Office is looking primarily into allegations of harassment at Sequoyah, since Sequoyah is the plant which TVA hopes to restart in the near future. However, it does not appear that the TVA IG or the NRC is investigating the more programmatic problems which the nuclear engineers whom I represent have brought forward. One engineer,

James C. Jones, has recently filed a \$2.2 million civil damages suit against TVA, after he lost all hope that the NRC would take any effective enforcement action against TVA.

The NRC's Office of Investigations has also been investigating my clients' charges of harassment for over three years. However, the Commission has not issued one investigative report, and has not taken any enforcement action against TVA on these cases.

In short, the NRC's response to serious and proven charges of harassment, intimidation, and retaliation is to attempt to silence the bearer of the bad news -- the Department of Labor -- and to cover up the evidence within its possession which proves the seriousness of the problem.

The Department of Labor is the one government agency which has taken its responsibility seriously to protect the public health and safety through enforcement of the employee protection provisions of the Energy Reorganization Act. The NRC's intercession on TVA's behalf with the Department of Labor appears intended to stop this enforcement. I request that the Committee

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in the course of its oversight responsibilities investigate the NRC's lobbying the Department of Labor on behalf of its licensee TVA as another instance of the NRC's inappropriate collusion with nuclear utilities in derogation of its duty to protect the public's health and safety.

Sincerely yours,

Lynne Bernabei
Attorney for Jerry D. Smith, Mansour
Guity, Robert C. Sauer, Phillip R.
Washer, James C. Jones, and Twenty-
three Former Employees of the Quality
Technology Company

cc: Chairman John D. Dingell, House Committee on Energy and Commerce
Chairman Morris K. Udall, House Committee on Interior and Insular Affairs
Lando Zech, Jr., Chairman, U.S. Nuclear Regulatory Commission
Commissioner James K. Asselstine, U.S. Nuclear Regulatory Commission
Commissioner Frederick M. Bernthal, U.S. Nuclear Regulatory Commission
Commissioner Thomas M. Roberts, U.S. Nuclear Regulatory Commission
Commissioner Kenneth M. Carr, U.S. Nuclear Regulatory Commission

/am

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

MEMORANDUM FOR: Victor Stello, Jr.
Acting Executive Director for Operations

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: CONVERSATIONS WITH TVA CONCERNING PENDING
DEPARTMENT OF LABOR (DOL) MATTERS

At the Commission meeting on March 11, 1986, with the TVA board of directors, a question arose as to why TVA was requesting hearings on the Department of Labor (DOL) Investigator's findings of discrimination with respect to three NSRS employees. TVA responded that it felt that only through hearings could it ascertain the facts that it needed to decide upon an appropriate course of action. Two reasons for this were that the DOL had not provided TVA with any details regarding the alleged discrimination (including the identity of the alleged discrimination officials) and the three complainants had refused to provide any information regarding the specifics of their complaints directly to TVA. Commissioner Asselstine referred to a conversation that he had had with the DOL area administrator (the official who signs the findings of discrimination) in which he was advised that if TVA were to file a Freedom of Information Act request, it would be provided with complete details of the DOL investigation, with the exception of material as to which assurances of confidentiality had been extended. Following the meeting, I was asked to explore possible means by which NRC could assist TVA in getting information which it needs from DOL which might obviate the need for TVA to go through an adversarial hearing simply to get that information.

I first spoke with Commissioner Asselstine who confirmed what DOL had said regarding the availability of FOIA to TVA. He also advised me that during the Commission meeting, Lynn Bernabei, counsel for the three NSRS complainants had expressed concern to John Austin about TVA's representation that the complainants were unwilling to discuss their problems with TVA since, according to her, TVA had never approached them. In discussing the FOIA aspect with Jim Lieberman and Jane Axelrad I learned that in the Parks case the "sanitized" DOL report provided to GPU was stripped of conclusions and details that could identify confidential sources rendering it difficult use. Nevertheless, Jane Axelrad spoke with a DOL headquarters official and told me she received the same information that Commissioner Asselstine had received from the area administrator. She also informed me that DOL has not appointed an Assistant Solicitor at headquarters. Monica Gallagher (523-7570), to oversee all nuclear whistleblower cases.

I then had a series of six telephone conversations with Herbert Sanger, General Counsel of TVA to pursue the matter. With regard to the question of whether TVA had tried to discuss the problems with the three NSRS complainants, Mr. Sanger informed me of the following. The first of the three to file a complaint was Mr. Smith, who had had some discussions with the TVA board of directors. After he filed was DOL complaint, TVA attorney Bill Mason tried to discuss his concerns with him. Mr. Smith stated that he was represented by counsel (Bernabei) and was instructed by counsel not to talk to TVA representatives. Mason then tried to talk to Mr. Guity (who had not yet filed a complaint) as a witness in the Smith case. He refused to discuss the matter. Consequently, when he filed a complaint with DOL (represented by Bernabei as counsel) TVA's OGC saw no point in further attempting to speak directly to him. Similarly, when Sauer, also represented by Bernabei, filed a complaint, no attempt was made to contact him directly. I was also informed that TVA has made no attempt to communicate directly with Bernabei.

Over the course of my several conversations with Mr. Sanger it became clear that the TVA board of directors and the Manager of Nuclear Power (Steve White) were firmly committed to two propositions: (1) intimidation and harassment of employees who raised safety concerns would not be tolerated, and (2) the due process rights of TVA managers would be scrupulously observed -- disciplinary action for alleged intimidation and harassment would only be taken upon a convincing showing that such action had occurred. The latter point was emphasized to me (as Steve White had emphasized it to you) because TVA was concerned that a number of managers, were afraid of a possible trampling of their rights in an effort to quell the rising tide of complaints -- whether proven or unproven -- of intimidation and harassment.

The crux of the problem facing TVA is that the DOL investigator handling the NSRS cases. Sandra Seeley, told two attorneys in TVA's Office of the General Counsel that any complaint from personnel in NSRS would result in a finding of discrimination. Her reason for expressing this willingness to prejudge the outcome of her investigations of complaints of NSRS personnel was that she had already formed an impression of management attitudes in NSRS. I understand that she has made similar comments to Bill Cottle, Assistant Manager of Nuclear Power.

Given all of the above, TVA management feels that it cannot act upon any information which might be provided by DOL (though none has been provided to date), but must instead insist upon a hearing (to which it is legally entitled) to get sworn testimony to identify the alleged discriminating officials and the details of the alleged discrimination. This position is based on their commitment to be fair to both the alleges and the alleged discriminating officials as well as the legal standard of proof which would be required to sustain any challenged disciplinary action before the MSPB.

My own conclusions based upon these several conversations are threefold. First, the NRC ought not to further consider ways to insert itself in the middle of the resolution of the DOL complaints. Second, we must consider the allegations (which TVA is willing to support with affidavits according to your conversation with Steve White) that the DOL investigator has unequivocally indicated a prejudgment bias against TVA in NSRS cases, in determining what action we ought to take in cases where the DOL has found discrimination. Third, OI should expedite its investigation into the alleged discrimination arising out of Commissioner's Asselstine's briefing.

Guy H. Cunningham, III
Executive Legal Director

Mr. J. Brian Hyland
Inspector General
Department of Labor
Washington, D.C. 20210

Dear Mr. Hyland:

As you are no doubt aware section 210 of the Energy Reorganization Act of 1974, as amended, assigns responsibilities to the Department of Labor for investigating and adjudicating complaints of alleged discrimination against employees who are engaged in protected activities under that Act. As a result of the Commission's regulatory activities involving the Tennessee Valley Authority, an allegation has come to our attention concerning the performance of a DOL investigator while conducting investigations under section 210. My attached memorandum, dated March 17, 1986, provides our information on the matter.

Since the conduct of a DOL, employee is involved, I bring this to your attention for whatever action you deem appropriate. I would appreciate your informing me of the resolution of this matter.

If I can provide further assistance, please call me at FTS 492-7308.

Sincerely,

Guy H. Cunningham, III
Executive Legal Director

Attachments

3/17/86 Memorandum

DIST: ROED Rdr
RCED Subj.

CCunningham Chron
JLieberman Chron
SE/EC;RH,WP,SC/ED Info
ELD Rdp
NRC Central Files
VSLelip
HDenton (to advise Senior Management Team)
RORD OELD

JLiebermann/et CCunningham
3/21/86 3/ /86

TENNESSEE VALLEY AUTHORITY
KNOXVILLE, TENNESSEE 37902

OFFICE OF THE GENERAL COUNSEL

The Honorable Theodor P. Von Brand
Administrative Law Judge
United States Department of Labor
Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669

Re: Jerry D. Smith v. Tennessee
Valley Authority - Case No. 87-ERA-20

Dear Judge Von Brand:

This is in response to Ms. Bernabei's October 1 and 8 letters concerning Mr. Smith's withdrawal of the complaint in this proceeding.

Mr. Smith has proffered no evidence to support his accusations and innuendoes in support of the purported basis for dismissal of his complaint. Indeed, the only evidence submitted with Ms. Bernabei's unsworn letters, the March 17 and 27, 1986, memorandum and letter from Guy H. Cunningham of the Nuclear Regulatory Commission (NRC), shows that there is no rational relation between the facts and Mr. Smith's and Ms. Bernabei's allegations. As shown by Mr. Cunningham's memorandum, TVA's allegation of bias by an investigator in the Department of Labor's Wage and Hour Division was referred to the NRC and DOL's Inspector General for investigation 19 months ago. We do not understand how such action could conceivably constitute "improper pressure." Moreover, there is no suggestion how an investigation of bias by a particular investigator within the Wage and Hour Division could affect the partiality of this de novo tribunal

such that Mr. Smith could not "receive a fair hearing." There is certainly no showing that TVA has engaged in any improper conduct.

For these reasons, as well as the obvious staleness of Ms. Bernabei's recitations, we do not believe that the reason given for withdrawing the complaint is credible. As stated by Mr. Marquand in the October 6 telephone conference, we do not object to the complaint simply being withdrawn for no stated reason, and this would be legally permissible. However, we do not think dismissal of the

Appendix C

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complaint should be predicated on the reason stated in Ms. Bernabei's October 1 letter. Therefore, we would not object to a hearing on whether complainant should be allowed to withdraw his complaint for that reason. Nor would we object to the appropriate administrative body investigating allegations of bias, which would include the propriety of TVA's, complainant's, and Ms. Bernabei's allegations.

Respectfully yours,

Justin M. Schwamm, Sr.
Assistant General Counsel

cc: Lynne Bernabei, Esq.
Bernabei & Katz
1773 T Street, NW.
Washington, D.C. 20009